Filed 4/5/10 P. v. Galvan CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JASON MICHAEL GALVAN, Defendant and Appellant.	F057479 (Super. Ct. No. TF005174) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Louis P. Etcheverry, Judge.

Sylva Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Jason Michael Galvan was convicted of possessing methamphetamine for the purpose of selling it. He argues that there was insufficient evidence to prove his intent to sell, that evidence of his possession of a cutting agent was admitted erroneously,

and that the prosecutor made an incurably prejudicial comment during closing arguments. We affirm.

FACTUAL AND PROCEDURAL HISTORIES

On October 13, 2008, Deputy Sheriff Robert Patrick approached a house in Taft belonging to Galvan's aunt. He found the aunt, Virginia Huckins, in the back yard. He said he was there to conduct a search pursuant to Galvan's probation; they went to the front door together.[1] Huckins, having left her keys inside, knocked. Galvan came to the door holding a clear plastic bag with a white substance inside. Patrick told Galvan to put the bag down, but Galvan turned around, hid the bag in his pants, turned back and said, "[W]hat bag"? Patrick searched Galvan and found the bag and a glass smoking pipe. The substance was later weighed and analyzed. It weighed seven grams and contained methamphetamine. The analysis did not determine whether it was diluted or undiluted methamphetamine.

Deputy Patrick handcuffed Galvan and asked which room was his bedroom. In the room Galvan indicated, Patrick found a cellophane cigarette wrapper containing two small zip lock bags. He also found a container marked "MSM" and a plastic grocery bag with the corners torn off. Inside the container there was a white powder and a scoop. Patrick did not find any scales, pay/owe sheets, weapons, or cell phones. He did not ask Huckins or anyone else to whom the items he found belonged.

The district attorney filed an information alleging possession of methamphetamine for the purpose of sale (Health & Saf. Code, § 11378) and possession of drug paraphernalia (Health & Saf. Code, § 11364). The information also alleged that Galvan had two prior convictions of methamphetamine possession and had served two prior

[1]In reality, Galvan was on parole at the time, not probation. By stipulation, the jury was merely told that Deputy Patrick contacted Galvez lawfully.

prison terms within the meaning of Penal Code section 667.5, subdivision (b). Galvan pleaded not guilty and denied the prior-conviction and prison-term allegations.

At trial, there was conflicting evidence about whether Galvan had the intent to sell the methamphetamine. Deputy Patrick testified that the smallest usable amount of methamphetamine is one-tenth of a gram, so seven grams could be 70 doses.[2] Another officer, Edward Whiting, testified that seven grams is not "a lot" of methamphetamine, but is more than a typical user would possess at one time for his own use. A "small time dealer" or "user/dealer," Whiting said, will often buy an "eight ball," equal to an eighth of an ounce or 3.5 grams of methamphetamine, for about $180, and divide it into 14 quarter-gram portions. The sale of eight of these portions at $25 each would cover more than the cost of the eight ball and leave the user/dealer with six portions for personal use. Adding a cutting or diluting agent to the drug at a one-to-one ratio, also a common practice, increases the seller's profit. User/dealers are the most common kind of dealers in Taft. Whiting also said small zip-lock bags and torn off corners of grocery bags are typical materials a seller would use to package methamphetamine. Whiting and Patrick testified that MSM is a common name for a substance made for use in veterinary medicine but often is used as a cutting or diluting agent by sellers of methamphetamine. They also agreed that a typical user would not wish to dilute his personal supply of methamphetamine; one ordinarily would cut the drug only to sell it.

Galvan testified in his own defense. He said he was not a seller and possessed the seven grams for his own use. He testified that he was 30 years old and had been an addict since he was 15. He smoked two grams every day or 14 grams per week. He used methamphetamine whenever he was not incarcerated and admitted that, despite having

[2]According to the trial transcript, the officer actually testified that seven grams would yield 700 doses at one-tenth of a gram per dose, but this was, of course, a mathematical error.

been to treatment centers, he had never really tried to quit. He claimed the zip-lock bags and cornerless grocery bag did not belong to him; he did not know what MSM was; and the room these items were found in was not his room. Galvan's friend Linda Miller corroborated Galvan's testimony that he was a drug addict. While Galvan was living in her house, she had seen him smoking methamphetamine continually and knew he spent all his money on the drug. Finally, she made him move out because of his drug use.

Some of the evidence impeached Galvan's credibility. He admitted he had three previous convictions of spousal battery and two of providing false identification to a police officer. While in custody on the current charges, he filled out two questionnaires at the request of John Jenks, an expert retained by the defense. On one of the questionnaires, Galvan marked "false" in response to the statement, "I would like to obey the law." He marked "true" in response to the statements, "Most people would lie to get what they want," and "Some crooks are so clever I hope they get away with what they have done."

Jenks, the defense expert, testified that it would not be unusual for an addict to use two grams of methamphetamine each day and that an addict would typically buy as large a supply as he could afford. Making fewer but larger purchases lowers the price, reduces the addict's exposure to being arrested or robbed, and reduces the addict's anxiety about not being able to find a source when his supply runs out. Jenks also testified that some addicts dilute their own drugs to make them last longer. Seven grams of methamphetamine, two small zip-lock bags, a grocery bag with the corners torn off, and a container of MSM would support a hunch that the person possessing them was selling the drugs, but Jenks would need additional information before he would be sure. He would want to rule out another person's ownership of the MSM and bags and would examine telephone and pedestrian traffic to the house, among other things.

The powder in the container marked "MSM" was not chemically analyzed and the prosecution introduced no evidence that it really was MSM. Both in a motion in limine

and during trial, defense counsel objected to the admission of evidence of the container and expert testimony regarding MSM. In the motion in limine, the defense argued that the label reading "MSM" was hearsay and lacked foundation. The trial court agreed that if the label was offered to prove that the substance in the bottle was MSM, it would be inadmissible hearsay. It also, however, accepted the prosecution's argument that the label could be admitted to prove Galvan's state of mind, i.e., his belief that the substance was MSM, and to show the basis of the expert testimony that Galvan possessed the intent to sell. It ruled that evidence of the label could be admitted through the testimony of the prosecution's expert if a proper foundation for it was laid, and that the jury would be admonished not to consider it for the truth of the matter it asserted.[3]

During trial, the prosecutor requested permission to introduce the container itself in order to show the jury the powder inside. Defense counsel objected on the ground of lack of foundation, and the court sustained the objection. Later, the prosecution proffered a paper bag containing the container and the glass pipe; the defense again objected on lack-of-foundation grounds. This time the court overruled the objection, concluding that a foundation had been laid pursuant to expert and other testimony. As already noted, the jury heard testimony that the container with the MSM label was found in Galvan's room and that MSM is a cutting agent often used by methamphetamine sellers. The label read "Ani-Med Horse Care, pure MSM."

[3]The parties have not cited any place in the record where the admonition was actually given. We have not found the admonition in our own review of the record. Deputy Patrick and Officer Whiting both discussed the container labeled MSM in their testimony. The court did not give, and defense counsel did not request, an admonition at those times. Galvan does not make any argument in this appeal based on the lack of an admonition.

During Galvan's testimony, the prosecutor asked him about his previous participation in drug treatment programs pursuant to Proposition 36. In her closing argument, the prosecutor referred to Proposition 36 again:

> "You have been able to look at him throughout the whole trial, you were able to look at his demeanor on the stand. Okay. He is smiling, he is grinning, he thinks he is so clever that he can get away with this. And he hopes he can get away with it. Most people would lie to get what they want. Gee, you think that's maybe Mr. Galvan? Think maybe he is going to lie to get Prop 36 or some treatment again?"

Defense counsel objected. The court sustained the objection and admonished the jury to "disregard that last statement." Immediately afterward, the prosecutor made a similar statement, but revised it to omit the reference to drug treatment: "Do you think maybe he is going to lie to get what he wants in this case? Not guilty on Count 1, not guilty on the sales." The court repeated and expanded the admonition after closing arguments:

> "Ladies and gentlemen of the jury, before I have the bailiff take you back to the jury room, I just want to admonish you on one thing. During the closing argument I sustained an objection when … argument [was] made that the defendant may be trying to not get convicted of the sales charge so he could get into a treatment program such as Prop 36 or some other program. I don't want you to consider punishment at all. You are not to consider that at all. Because the sole person that makes a determination of, one, whether he is legally eligible for any programs, those are sentencing factors, those are things that the court will take up and the court will ultimately will make a decision on what the sentence in the case should be. So you should not consider punishment in any way, form, in any form at all during your deliberations. You should not even discuss those facts.
>
> "Does everybody understand that? If you don't understand that, raise your hand, we will talk about it further. Okay. Thank you.
>
> "With that admonition, Mr. Bailiff, will you take charge of the jury, please."

Before closing arguments, as part of the jury instructions, the court read the jury Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 200, which includes this: "You must reach your verdict without any consideration of punishment."

The jury found Galvan guilty as charged. The court found one of the Penal Code section 667.5 prison-term allegations true and the other not true. Galvan moved for a new trial, claiming the prosecutor's closing argument about Proposition 36 was incurably prejudicial. The court denied the motion and imposed the three-year upper term for possession of methamphetamine for sale, a concurrent 90-day term for possession of drug paraphernalia, and a consecutive one-year enhancement under Penal Code section 667.5.

DISCUSSION

I. Sufficiency of the evidence

Galvan argues that insufficient evidence was presented at trial to support the conviction of possession of methamphetamine for sale. Specifically, he claims the evidence was insufficient to show he had the intent to sell. When the sufficiency of the evidence is challenged on appeal, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

A specific intent to sell may be shown by circumstantial evidence and reasonable inferences that can be drawn from it. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) Galvan was found in possession of a quantity of methamphetamine large enough to be divided into many portions for resale. He had a few items that could be used for packaging, the presence of which he could explain only by saying they did not belong to him. He had a container labeled with the name of a common cutting agent, which he also could not account for except by claiming ignorance. The prosecution's expert testified that all these items were indicators of the intent to sell and were typical in the case of a small-scale "user/dealer." Galvan's own expert did not contradict this opinion, but merely said he would want additional evidence before he would reach a definite conclusion. The prosecution's expert also said a user typically would not use a cutting

agent to dilute his own drugs. Galvan's own testimony was impeached by his prior convictions of crimes of moral turpitude. Considering all this evidence and making a judgment about Galvan's credibility, the jury could reasonably infer, beyond a reasonable doubt, that Galvan had the specific intent to sell his methamphetamine.

Galvan points to items of evidence that could support the contrary inference: It was not seriously disputed that Galvan was an addict. The defense expert said an addict could easily use two grams a day, might very well have several days' supply on hand, and might dilute his own drugs to make them last longer. The police did not find additional things often possessed by dealers, such as scales, pay/owe sheets, or weapons. They did not question others in the house about whether the bags and MSM might belong to them. Galvan claimed the room in which the items were found was not his room.

Galvan's claim is, in effect, a claim that the jury was confronted with conflicting evidence and weighed that evidence incorrectly. Whether the jury weighed the evidence correctly is not a question we are authorized to answer, however; appellate courts do not reweigh evidence after a jury has determined a question of fact. (*People v. Newland* (1940) 15 Cal.2d 678, 681; *People v. Smith* (1955) 134 Cal.App.2d 417, 418; *People v. Hayes* (2006) 142 Cal.App.4th 175, 179.) We review a claim of insufficient evidence only to determine whether there was substantial evidence in support of the result, in light of the governing standard of proof. We conclude there was sufficient evidence to support the verdict.

II. Admission of the MSM evidence

Galvan contends that the evidence of the container labeled "MSM" and expert opinions based on it were admitted erroneously because there was no showing that the substance in the container was, in fact, MSM. He does not renew his claim that the label was inadmissible hearsay. He limits himself on appeal to the contention that the chemical identity of the substance was a foundational or preliminary fact that had to be established before the evidence of the container and the expert opinions could be

admitted. We review the trial court's decision to admit the evidence for an abuse of discretion. (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 135.)

A preliminary fact is "a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence." (Evid. Code, § 400.) For instance, in *People v. Collins* (1975) 44 Cal.App.3d 617, the identity of a caller was a preliminary fact that had to be established before testimony that a witness received an exculpatory call from the caller could be admitted, since evidence of the call was inadmissible for lack of authentication unless the identity of the caller was proven. (*Id.* at p. 628.)

The chemical identity of the substance in the container was not a preliminary fact that had to be proven before the container labeled "MSM" and the expert testimony about MSM could be admitted. The container, label, and expert testimony were admissible even if the white powder inside the container was not really MSM. To be relevant to prove the intent to sell—both directly and as a basis for an expert opinion—the container and label had only to support the proposition that Galvan intended to use the contents as a cutting agent. In other words, the label was relevant to show that a person in possession of the container likely believed it contained a cutting agent, and that in turn was relevant to show the intent to sell the methamphetamine, which also was in the person's possession. This would be so regardless of whether the powder in the container was MSM or only looked like it.

We have found no indication in the record that the jury was instructed to consider the MSM-labeled container only as evidence of the intent to sell and not as evidence of actual possession of MSM, but Galvan does not argue that such an instruction would have made any difference. After all, he was charged with intending to sell methamphetamine, not with possessing MSM.

It is true, as Galvan points out, that both the police expert and the prosecutor spoke as though the identity of the powder in the container had been established. Defense counsel, however, did not request an instruction clarifying that the MSM evidence was

admitted only to show Galvan's state of mind, and we do not see how such an instruction could have made a difference.

The court did not abuse its discretion when it admitted evidence of the MSM-labeled container, and expert testimony based on it, without proof that the powder inside was MSM.

III. Improper closing argument

Galvan argues that the trial court erred when it denied his motion for a new trial based on the prosecutor's improper reference to punishment in her closing argument. The impact of the improper argument was magnified, he contends, by references to his earlier failures in court-ordered drug treatment, which the prosecutor elicited from him during cross-examination. He claims the improper argument was incurably prejudicial, so the court's admonition to the jury about this argument was insufficient.

Our Supreme Court has held that a trial court's ruling on a new trial motion will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. (*People v. Williams* (1997) 16 Cal.4th 635, 686.) The Supreme Court has applied this holding to the denial of a new trial motion as well as to the granting of one. (*Ibid.*) On the other hand, the Supreme Court has also held that "[i]n our review of [an] order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.) The latter holding is older, but it has not been overruled and has been applied repeatedly and recently by our appellate courts. (See, e.g., *Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 693-694; *Wall Street Networks, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176-1177.) In *People v. Nesler* (1997) 16 Cal.4th 561, 582, in a plurality opinion for three justices, Chief Justice George wrote that the denial of a motion for a new trial must be reviewed independently on appeal where the issue was whether juror misconduct was prejudicial, since the

question of prejudice was a mixed question of law and fact. In light of all these decisions, the question of the right standard of review here is unclear. Preferring to err on the side of caution, we will apply the more stringent, independent, standard of review before rejecting Galvan's contention.

Improper argument by a prosecutor is prejudicial and requires reversal if the prosecutor's "comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) The question is "whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) In general, an admonition by the trial court to disregard the improper comments cures the prejudice. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302; *Tobler v. Chapman* (1973) 31 Cal.App.3d 568, 576; *Jonte v. Key System* (1949) 89 Cal.App.2d 654, 659.) We presume juries follow trial judges' instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

In this case, the court acknowledged that the prosecutor's reference to punishment was improper. It twice admonished the jury to disregard the comment, instructing the jurors that they were forbidden to take punishment into account when rendering their verdict. The admonition was thorough. It reinforced the court's earlier pattern instruction directing the jury not to consider punishment. Under these circumstances, and in light of the evidence, the presumption that a jury follows the court's instructions controls and requires that we uphold the trial court's decision to deny the motion for a new trial.

Galvan claims the presumption that juries follow instructions was rebutted in this case. He argues that if "the jury did not follow at least one instruction," then we cannot presume that the jury followed any of the court's other instructions. He says the record here shows the jury did fail to follow one of the court's instructions: Instead of notifying

the bailiff when it reached its verdict, as the court had instructed, the foreperson sent a note to the judge stating that a verdict had been reached.

This is not at all persuasive. The foreperson's trivial mistake of protocol (Galvan admits it was trivial) implies nothing about whether the jury followed the court's instructions in matters of substance affecting the outcome of the case. The presumption that jurors follow instructions was not rebutted.

Galvan also argues that the admonition did not cure the effect of the improper remark because "the issue of specific intent in this case was based upon a credibility assessment …." There is, however, no rule that an improper closing argument bearing upon a credibility assessment, where the disputed issue is intent, is necessarily incurable. The cases Galvan cites in this context, *People v. Hall* (2000) 82 Cal.App.4th 813 (*Hall*), *People v. Allen* (1978) 77 Cal.App.3d 924 (*Allen*), and *People v. Hardy* (1948) 33 Cal.2d 52 (*Hardy*) are distinguishable.

In *Hall*, a crack cocaine possession case, the defense was that the defendant did not possess the drug and the officer who testified was lying. (*Hall, supra,* 82 Cal.App.4th at pp. 815-816.) The prosecution called only one of the officers present at the arrest to testify. In closing argument, the prosecutor stated that he did not call the other officer because his testimony would have been the same. Defense counsel's objection that the prosecutor was arguing facts not in evidence was overruled and no admonition was given. (*Id.* at p. 816.) The Court of Appeal reversed the conviction, holding that the assertion of a fact not in evidence was highly prejudicial; it was not satisfied beyond a reasonable doubt that the misconduct did not affect the verdict. (*Id.* at pp. 817-818.)

In *Hall*, there was no admonition and the presumption that juries follow instructions did not come into play. In the present case, of course, the court sustained defense counsel's objection and gave the jury two clear admonitions to disregard the improper comment.

In *Allen*, a robbery case, the defense was that the defendant did not participate in the robbery. (*Allen, supra*, 77 Cal.App.3d at p. 929.) The mother of a coperpetrator testified that the defendant's sister said the defendant "'was on parole and he couldn't stand another beef.'" (*Id.* at p. 934.) The trial court denied the defendant's motion for a mistrial, but admonished the jury to disregard the testimony. (*Id.* at pp. 930, 934.) In spite of the admonition, the Court of Appeal held that the denial of a mistrial was reversible error:

> "An examination of the record reveals an extremely close case in which the jury had to make its fact determination based upon the credibility of the appellant and his witnesses and on the credibility of the prosecution's witnesses. In light of these facts, it is reasonably probable that a result more favorable to appellant would have been reached had the prejudicial information of appellant's parole status not been divulged to the jury." (*Allen, supra*, 77 Cal.App.3d at p. 935.)

At least two considerations distinguish this case from *Allen*. First, we do not think this is "an extremely close case." Galvan was found with multiple doses of methamphetamine on his person, and packaging materials and an apparent cutting agent were found in the house where he was staying and arrested. There was no evidence connecting the indicia of sales with anyone else in the house. The methamphetamine itself connected them with Galvan. Second, the error in this case involved only the prosecutor's speculation about lesser consequences Galvan might experience if he were believed and convicted of a lesser offense; it did not involve the divulgence of a fact about the defendant that was harmful to the defense, as in *Allen*. For both of these reasons, the error was less harmful here than in *Allen* and the admonition was able to cure it.

Hardy was a capital murder case based almost entirely on out-of-court oral statements made by the defendant. (*Hardy, supra*, 33 Cal.2d at p. 55.) The trial court admitted testimony describing a confession by either the defendant or her coperpetrator husband—it was impossible to tell which one. The jury heard two versions of the

witness's story. The witness testified directly to the jury, but then the court directed the reporter to read another version of the story, which the witness had given earlier outside the jury's presence. The next day, the court ordered the testimony stricken, but in the course of doing so, it read the testimony to the jury again. (*Id.* at pp. 60-61.) The Supreme Court noted that, "[u]nder ordinary circumstances," the trial court can correct an error in admitting evidence by ordering the evidence stricken and admonishing the jury to disregard it. (*Id.* at p. 61.) Under the circumstances of *Hardy*, however, the testimony "went to the main issue" and "was unduly emphasized by the manner in which it was presented," so it was "extremely unlikely that the jury could wholly reject the evidence and completely disregard it in their deliberations." (*Id.* at p. 62.)

Galvan's case is not similar. Again, the improper statement concerned lesser consequences Galvan might receive if convicted of a lesser charge, not facts that incriminated him. This case presents the "ordinary circumstances" to which the Supreme Court referred.

Finally, Galvan argues that the prejudice could not be cured because the evidence was closely balanced, and the prosecutor repeated the misconduct after the court ruled. He quotes *People v. McKelvey* (1927) 85 Cal.App. 769 (*McKelvey*), in which, after describing the "'general rule'" that the court's admonition cures prosecutorial misconduct, the Court of Appeal stated:

> "'[N]evertheless it is a recognized exception to that rule that, where, as here, in a closely balanced criminal case, misconduct is repeated and persisted in, despite the warnings and admonitions of the trial court, and is so pronounced and pernicious that it is not in human nature to forget or disregard its prejudicial effect, then manifestly a mere admonition or any number of admonitions will not suffice to right the wrong done, and the only remedy remaining is to be found in reversal of the judgment.'" (*McKelvey, supra*, 85 Cal.App. at p. 774.)

McKelvey involved a conviction of committing a lewd act upon a child. Evidence of the defendant's reputation for unchastity and immorality was inadmissible because the

defendant did not put his reputation in issue, but, over his objection, the court admitted testimony on that subject by five prosecution witnesses. Later that day, the court concluded that the testimony was inadmissible after all, ordered it stricken, and admonished the jury to disregard it. (*Id.* at p. 770.) The Court of Appeal reversed the conviction. (*Id.* at p. 775.)

Unlike *McKelvey*, this is not a closely balanced case. Further, Galvan is mistaken when he says the prosecutor repeated the misconduct after the court ruled. Before the court ruled, the prosecutor said, "Think maybe he is going to lie to get Prop 36 or some treatment again?" After it ruled, she said, "Do you think maybe he is going to lie to get what he wants in this case? Not guilty on Count 1, not guilty on the sales." The second remark was not misconduct. The essence of Galvan's defense was that he possessed the methamphetamine for his own use, so he should be convicted only of simple possession. It was proper argument to say he was not telling the truth because he did not want to be convicted of the greater offense. Consequently, we follow the rule that a proper admonition generally cures an improper argument.

IV. Penal Code section 4019 amendment

On January 25, 2010, after defendant was sentenced, an amendment to Penal Code section 4019 became effective. The amendment increased the amount of presentence conduct credit available to defendants who are not required to register as sex offenders and whose current and prior offenses do not include serious or violent felonies. In a standing order filed on February 11, 2010, we deemed raised the issue of whether the amendment applies retroactively to pending appeals in which the defendant was sentenced before the effective date. We have considered this issue and we conclude that the amendment does not apply retroactively for the reasons set forth in *People v. Rodriguez* (2010) 182 Cal.App.4th 535. Defendant in this case, therefore, is not entitled to additional credits under the amendment.

We have read and considered Galvan's motion to augment the record, filed March 2, 2010, and the attached materials. We will grant the motion, but the materials do not alter our conclusion.

DISPOSITION

The judgment is affirmed. Galvan's motion to augment the record, filed March 2, 2010, is granted.

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Wiseman, Acting, P.J.

WE CONCUR:

_____
Dawson, J.

_____
Kane, J.